

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



CORRECTED

# 76-1108

In The

**United States Court of Appeals**

For The Second Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

JOHN J. DWYER,

*Defendant-Appellant.*

*On Appeal From the United States District Court of the  
Southern District of New York, Sat Below: Hon. Kevin T.  
Duffy, and a Jury.*

**AMENDED BRIEF FOR DEFENDANT-  
APPELLANT JOHN J. DWYER**

MILTON DIAMOND

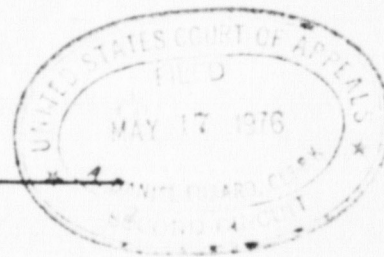
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's refusal to permit the testimony of a licensed psychiatrist, who is also a treating physician, by defendant in support of an insanity-type defense deprived defendant of a fair trial?
2. Whether co-defendant's reference in his summation to this defendant's failure to take the stand deprived this defendant of a fair trial?
3. Whether the indictment must be dismissed where commission of a criminal act (mailing a live cartridge to a co-defendant) under the government's aegis by an informer led to the government obtaining relevant evidence?

STATEMENT OF THE CASE

Defendant John Dwyer was indicted with two co-defendants, John Dobranski and Stephen Smith, on various violations of federal gun control laws arising out of two incidents at Smith's apartment at which Dwyer produced various firearms, some of which were purchased by an undercover agent, Joseph Kelly. D1a-4a. Smith pleaded guilty. D251a-20 Dwyer and Dobranski were tried jointly. Both were convicted on all charges in a trial before Hon. Kevin T. Duffy, and a jury, in the United States District Court for the Southern District of New York. This is a criminal appeal as of right. Neither defendant took the witness stand. Dwyer's sole defense was lack of criminal intent based on his incapacity to appreciate that his conduct was wrong; or on his inability to make his conduct conform to the requirements of law. D7a-10a.

Dwyer offered testimony through other members of his family, principally his father, D 70a-115a, that he was obsessed with almost a lifelong desire to acquire military paraphernalia, particularly from World War II (D 166a-20; D 86a, et seq). A small fraction of his collection was actually brought into the court room and exhibited to the jury. It consisted of boxes and boxes of swords, books, pictures, insignia, helmets, models, flags and pennants, articles of clothing, etc. (D93a, et seq). Pictures of him as a small child posing with military equipment were introduced. D 76a-17.

Dwyer was 38 years of age. He had never married, and had almost no social life because he husbanded both his time and money for devotion to his collection of military items, D 87a-88a. He took employment as a machinist to learn skills that would enable him to service the articles in his collection. D 95a-96a.

He served in the Air Force for four and a half years. D 89a2-7. His military records showed a history of psychiatric treatment. D 89a-18.

Thereafter, about nine years prior to trial, Dwyer entered treatment by a civilian psychiatrist, Dr. Paul Stewart of Union and Perth Amboy, New Jersey. D 90a-9. Dr. Stewart was deceased at the time of trial. D 90a-17.

Letters written by Dwyer to Smith and introduced into evidence by the government expressed a desire to acquire all the guns of a certain type that he could, even though collecting military items, according to the letters, was driving him broke. D 15a-19, et seq.

The motivation for the sale of a few items by Dwyer to the undercover agent was not clarified because of Dwyer's failure to take the stand. It seems probable they were not really a capitalistic venture, but arose out of desires to accomodate a fellow collector, or to aid rearranging his own collection by generating funds for new purchases of more desired items. D 140a-14. Smith, in whose apartment the sale took place, was a collector D 24a-25. A number of guns were confiscated from him. Smith met Dwyer through the witness

Costabile, a mutual friend who was a collector. D 13a-14a.  
He knew Dwyer as a collector. D 13a-5.

There was no showing, nor even any contention, by the government that any of the weapons involved had been used in any criminal activities (other than violation of the Gun Control laws), or that they were destined for such use, or for use by military or para-military forces either here or abroad. See D 172a-15. The government offered no evidence to contradict Dwyer's contention that he was an obsessive collector of all military paraphernalia, not just guns.

On the day that the trial was originally scheduled to commence, Dwyer handed up written requests to charge, including a classic restatement of the defense of insanity as it has evolved since the Durham case, D 5a-6a. The government immediately moved for a continuance to permit it to obtain a psychiatric evaluation of Dwyer. D 162a-12. This was granted.

The government had Dwyer examined by Dr. Stanley Portnow. He testified that Dwyer was able to conform his conduct to the standards the law required. However, he gave this explanation of why Dwyer collected military paraphernalia:

"Mr. Dwyer from day one was ill, physically ill. He was born with a pyloric stenosis, which is an inability of an infant to keep food down, so he had surgery. In addition, he had to compete with a brother with whom he was unable to compete; he attempted to get into athletics, but felt that he was not strong enough or could not coordinate well enough. He was unable to live up to what he considered to be his father's expectations. He slowly, developed into adolescence, a shy, withdrawn, young

man who had within him the idea that he really was not a man, that he really could not live up to the idea of what a man was in this family. And then his brother went into the Marine Corps, in addition, and that was injury upon injury.

"In addition to that, he had a nystagmus, which is a shifting of the eyes back and forth, and he has some degree of facial asymmetry, so that he saw himself basically as a defective man, as a man who didn't measure up in spite of his height and so forth. In order to compensate for his so-called deficiencies as he saw them and felt them, what he considered to be deficiencies, he decided that he was going to strengthen himself, he decided he is going to become a big man for what was weak within him and unable to compete, that he would develop this hobby in which he collected things which could, in fact, fill in for where he felt he was unable to function.

"He collected guns, he collected military paraphernalia, all in an effort to bolster what he felt to be his lacking masculinity. To that extent the type of treatment which he experienced as a child between father and son played a role in his development, and particularly in why he picked a hobby which was geared to make up a really big man. After all, when you have 230 guns at home, 'Don't mess with me,' and you are a big man. And it doesn't make any difference whether you have a facial asymmetry or a nystagmus of the eye, does not matter whether you cannot compete in athletics, and even if your brother is a captain in the Marine Corps, that makes you a big man." D 192a-13 to D 194a-2.

\* \* \* \* \*

" \* \* \* I knew all of the factors about his social life and his friendlessness, and that was all made known to me when I made my conclusion." D 196a-13.

Dwyer offered the testimony of two doctors. The first, Robert T. London, was a practicing psychiatrist. D 128a. Doctor London had never testified in court before. D 141a. He had difficulty with the terminology "mental disease or defect." D 137a-11; D 138a-17; D 146a. That there is a communication gap

between lawyers and psychiatrists is well known. Davidson, Forensic Psychiatry, Preface v.(1952).

The trial court expressly recognized that Doctor London was having trouble with the legal terminology. D 141a-6; D146a-4. Doctor London was equivocal whether Dwyer had a "mental disease," D149a-14 to 21, or "defect," D137a-9 to D138a-18, preferring the terms "emotional problem," D137a-11, "a schizoid personality," D137a-20, "an emotional disorder," D138a-16, "a personality disorder," D149a-15, and "stress prone," D149a-22. But Doctor London was clear that because of his condition, however labeled, with respect to the issue of military equipment, Dwyer "would lack sufficient ability to conform his behavior to the law." D139a-23.

The defense had planned to call James T. O'Connell, M. D. D 205a, 206a. Even the government psychiatrist, Portnow, knew this at the time of his examination of Dwyer on the eve of trial, D 175a-23. He considered a written report by O'Connell in formulating his own opinion, D174a-13, as did Doctor London, D 135a-6 to 20.

Doctor O'Connell's qualifications included forty years experience, which is devoted to abnormal psychology and psychiatry, during which he headed a state hospital and has frequently been admitted as an expert witness in the courts of New Jersey. He is a forensic psychiatrist. D 311a-15, et seq.

Besides having been retained as an expert witness, Doctor O'Connell had been treating Dwyer for his mental condition a few months prior to trial. D 206a - 207a; D 307a.

Doctor O'Connell had been alerted by Dwyer to be available to testify on what was expected to be the second day of the trial, Tuesday, December 9, 1975. D 222a; D 308a-16.

However, when the trial judge was sick a day and the government made a last minute request for a continuance to obtain a psychiatric evaluation of Dwyer, the resulting delay of the trial threw off the schedules of the defense and Doctor O'Connell, and made it impossible for Dwyer to produce Doctor O'Connell during the defense case in chief. D 222a. The defense did produce the lay testimony of the family members and made last minute arrangements to obtain the somewhat indecisive testimony of Doctor London during its case in chief.

The government presented the testimony of its psychiatrist, Doctor Portnow, only on rebuttal, despite the fact that it had notice through the written request to charge and the opening that Dwyer intended to raise the defense of mental competence and did not deny the basic facts of the offenses charged.

Dwyer then offered the testimony of Doctor O'Connell on surrebuttal. Dwyer should have been entitled to present such testimony even if for no other reason than that Dr. Portnow had relied on a report by Doctor O'Connell. When Doctor O'Connell was proffered as a witness, the government was granted a voir dire.

The following testimony was elicited by Dwyer as an offer of proof that Doctor O'Connell's testimony was relevant:

"What I have had on all these factors and my knowledge and understanding of the patient gained from interviews, tests and treatment it's my opinion that on September 1, 1974, October 5, 1974, the accused person John Dwyer was in truth suffering from a mental disease or defect which deprived him of substantial capacity to conform his conduct to the requirements of the law.

"I have a further opinion, sir. It's my further opinion that the criminal acts charged against him on the above mentioned dates were the direct products of his mental disease or mental defect, and I have diagnosed that as a psychasthenia \* or an all-consuming obsession and overwhelming compulsion in patient Dwyer to deal and trade in weaponry and other trophies of warfare. This dominated his life and it ruled his behavior and conduct against his conscious will over which he had no control." D 209a-6 to 21.

The government then launched into the kind of cross-examination that one might expect when the doctor testified before the jury. It went far beyond the doctor's qualifications and the offer of proof quoted above, and attacked the doctor's credibility. At the conclusion of the voir dire, the trial court ruled that it would exclude Doctor O'Connell's testimony. Despite several requests by Dwyer for the trial court to state the reasons why he was excluding Doctor O'Connell's testimony, D 244a-6; D 310a - 312a , the trial court largely declined to do so.

It would seem that his reasons were to some extent to accommodate the government lawyers who preferred not to have to cross-examine Doctor O'Connell without the assistance of Doctor Portnow, who had left on a trip out of state immediately

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\* This word appears in the transcript as "psychoneurosin." It is a transcription error. D 208a -9 to 11; D 308a -6.

after his own testimony, D 225a-15; D 242a-4, but more so primarily because the court felt that Doctor O'Connell lacked credibility. The Court:

"If you want to know what my views are on Doctor O'Connell's credibility, that is not what I based it on, but Doctor O'Connell's credibility is just about zero." D 310a-11.

"I was shocked that a medical doctor could get to the point where he would do what Doctor O'Connell did." D 311a-2.

"You're asking about the credibility, and I told you." D 311a-11.

The court stated that if Doctor O'Connell had been permitted to testify, "the government could have done a number on him." D 312a-17.

Since the cross-examination during the voir dire was not restricted to the doctor's qualifications and the relevance of the proffer of proof, but ranged through the whole gamut of the weight of his testimony and credibility, it is a matter of record that the government did not lack the ability to cross-examine him without the assistance of Doctor Portnow. It apparently only strengthened the trial court in its belief that the government "could do a number" on the doctor. Thus, we know that the absence of Doctor Portnow during the government's potential cross-examination of Doctor O'Connell would not have caused the government any inconvenience.

Although defendant Dobranski did not take the stand, it was clear that his defense was that he was no more involved than a taxi driver who brought Dwyer to the Smith apartment. Cross-

examination of the government witnesses brought out that, although Dwyer and Dobranski arrived together on both visits to Smith's apartment in an automobile owned and operated by Dobranski, the contraband items were carried from the trunk of the automobile to the apartment in closed containers by Dwyer with some assistance by persons other than Dobranski. Dobranski further showed by cross-examination of the government witnesses that he took no part in negotiations for the sale of any items, had little interest in them, and did not even remain in the room where the negotiations took place at all times. There was no showing by the government that Dobranski profitted from the transactions.

The connection of Dobranski to the crimes was very tenuous until the government introduced a pack of letters, discovered at the last minute before trial, from Dwyer to Smith. The letters said that "B. S. J." was his partner. Smith had testified when Dwyer made the arrangements to bring the guns to Smith's apartment, he told Smith he would be driven there by "B. S. J."

At the time the letters were offered in evidence, Dobranski requested the trial court to rule that the letters were not admissible against Dobranski unless they were connected to him. The court readily granted this request, and so instructed the jury at the time. No evidence beyond the letters was ever offered by the government to show that they were written with his authority or approval, or as part of a conspiracy of which he was a member. The letters were written after any alleged conspiracy had been either completed or frustrated by the arrests and seizures.

During the government's summation, it referred to Dobranski almost exclusively as "B. S. J." It harped on the letters. Dobranski's summation, besides reviewing the tenuousness of the connection of Dobranski to the gun transactions aside from the letters, spent a great deal of time and emphasis stressing that the use of the letters against Dobranski was unfair, primarily because the author of the letters, Dwyer, was not subject to cross-examination by Dobranski because Dwyer had chosen to exercise his privilege against self-incrimination and did not take the stand. D 245a-19. The failure of Dwyer to take the stand was dramatically brought home to the jury by Dobranski's counsel showing the futility of attempting to cross-examine the letters. He placed the letters on the witness stand during his summation and then addressed a long series of questions to the letters that he would have addressed to Dwyer if he had taken the stand. The repeated lack of answers to the questions emphasized in a very forceful way that Dwyer had not taken the stand. D 305a, 306a.

In rebuttal summation, the government came back to the letters, inviting the jury to take them into the jury room and look at them in evaluating Dobranski's guilt or innocence. The jury interrupted its deliberations to ask for the letters.

Dobranski requested the charge that the letters were not evidential against Dobranski unless the jury found by independent evidence that a conspiracy existed. The court declined to so charge.

The jury found both Dwyer and Dobranski guilty of all charges.

## ARGUMENT

### POINT I

The Refusal Of The Trial Court To Permit Doctor James J. O'Connell, A Fully Qualified Psychiatrist And Treating Physician Of Defendant, To Testify In Support Of The Defense Of Mental Disease Or Defect Deprived Defendant Of A Fair Trial And Of His Constitutional Right To Trial By Jury.

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As noted in the Statement of the Case, Dwyer put the government on notice that he was raising a defense based on mental disease or defect immediately prior to trial by serving written requests to charge. It was also brought out in Dwyer's opening.

The trial court permitted Dwyer to introduce lay testimony from members of his family, chiefly his father, concerning his overwhelming preoccupation with collection of military paraphernalia, primarily from World War II. The court charged the jury that they had the right to take this lay testimony into account in deciding whether or not Dwyer was exculpated by virtue of a mental disease or defect.

Doctor London also testified for Dwyer on this issue. However, he had seen Dwyer only once prior to trial, had never testified in court before, and was unfamiliar with the significance attributed to the terms "mental disease" and "mental defect" by the law.

Dwyer had intended to call Doctor O'Connell during his case in chief. Doctor O'Connell was not only highly qualified as a psychiatrist, but had treated Dwyer for months prior to trial. He had testified previously, and was familiar with the relevant terminology.

Because of a last minute delay of the trial resulting from temporary illness of Judge Duffy on December 8, 1975 and the government requesting time to have their own psychiatric examination made, the schedule of Doctor O'Connell's appearance that Dwyer had planned was thrown off. Doctor O'Connell was not able to appear during the presentation of Dwyer's defense in chief.

The government offered no evidence on Dwyer's mental condition during its case in chief. However, it offered the testimony of Doctor Portnow in rebuttal of the lay testimony and the testimony of Doctor London offered by Dwyer.

The defense then offered Doctor O'Connell in surrebuttal. A voir dire was requested and granted. Doctor O'Connell was eminently qualified as a psychiatrist, was also a treating physician, and had formed an opinion as to Dwyer's mental condition which the law clearly recognizes as a defense. Doctor Portnow had relied on two earlier written reports by Doctor O'Connell in forming his own opinion for the government. The voir dire cross-examination of Doctor O'Connell went beyond his qualifications. The government attacked his credibility, and convinced the trial court that it was totally lacking.

Despite repeated requests by Dwyer that the trial court put the reasons for its exclusion of Doctor O'Connell on the record, the court gave little elaboration of its reasoning. What the court did and did not say clearly shows that the court had no doubt about the doctor's qualifications, but did not consider him credible.

It is well settled that the credibility of any witness, including an expert witness, is for the jury, not the court. Mims v. United States, 375 Fed. 2d 135 (5th Cir.)

As even the court below recognized, lay persons can testify to facts which may form the basis of a reasonable doubt in the minds of the jurors as to the defendant's culpability based on his mental condition. D 277a, 278a.

It is well settled that even a physician who is not a psychiatrist can testify as to his opinion of the defendant's mental condition. Traut v. Gandy, 424 P. 2d 52 (Okla.); Charter Oak Life Ins. Co. v. Rodel, 95 U.S. 232; Nelson v. State, 35 Wisc. 2d 797, 151 NW 2d 694; Annot., 54 A.L.R. 864. An opinion may be based on statements by others incorporated into hypothetical questions. Annot., 56 A.L.R. 3d 300.

A fortiori a psychiatrist should be allowed to testify about mental conditions, and a treating psychiatrist to give an opinion based on facts adduced from others incorporated into a hypothetical question, from hearsay elicited from defendant for the purposes of treatment, and from his own observations.

The government may try to justify the exclusion of Doctor O'Connell's testimony on the ground that it was prejudicial to the government to have him testify in the absence of the government psychiatrist, Doctor Portnow. Doctor Portnow left on a trip out of state immediately after the conclusion of his rebuttal testimony. If he had not left, and Doctor O'Connell did testify, he would have been available to assist the government's attorneys in cross-examination of Doctor O'Connell. The government urged this as a ground for excluding the testimony of Doctor O'Connell. But this argument was not persuasive with the trial court, because, (despite the departure of Doctor Portnow) the Court allowed Doctor O'Connell to take the stand, never again adverting to Doctor Portnow's absence. D 206a - 23. In the event, it is clear that the absence of Doctor Portnow did not detract from the government's ability to cross-examine Doctor O'Connell. Since the voir dire cross-examination of Doctor O'Connell ranged largely over the area of credibility, the government's ability to cross-examine Doctor O'Connell without the assistance of Doctor Portnow is a matter of record. It was so impressive to the trial court that he was convinced that if Doctor O'Connell had testified, "the government could have done a number on him."

The only other possible source of prejudice to the government by allowing Doctor O'Connell to testify in the absence of Doctor Portnow would have been the inability of the government to use Doctor Portnow for sur-surrebuttal. But in no case does the government have an absolute right to sur-surrebuttal. Permitting

it is a discretionary matter with the court. It seems unlikely that any sur-surrebuttal would have been called for here, since Doctor Portnow had testified fully during the rebuttal, and any further testimony by him would probably have been repetitious.

The purpose of sur-surrebuttal is not, of course, to bolster the government's case, but would be limited to attacking the evidence offered by the defense during surrebuttal. The government was getting daily copy of the transcript at the time when Doctor O'Connell's testimony was proffered. If Doctor O'Connell had been permitted to testify, and sur-surrebuttal became essential to the government's case, if Doctor Portnow could not return from his out of state tript to give it, it would not have been impossible to offer testimony of another doctor.

As noted above, the trial court had largely rejected the government's objection to Doctor O'Connell's testifying based on the absence of Doctor Portnow. So it comes down to the right of the trial judge to exclude Doctor O'Connell's testimony based on the court's view that, although he was fully qualified, he lacked credibility.

Apparently a major factor that led the trial court to question Doctor O'Connell's credibility was his labeling of Dwyer's mental disease or condition as "psychasthenia." The trial court stated during sentencing (which has not been transcribed) there was no such disease. It is ironic that a leading authority has warned of the danger of this very term, psychasthenia, being misunderstood by persons not psychiatrists. Davidson, Forensic Psychiatry (1952), at 43:

"Other words which can be misunderstood by intelligent laymen are: \* \* \* psychasthenia \* \* \*."

Intelligent laymen in this context means persons without professional qualifications in psychiatry, including judges, since the work was "written as a psychiatric-legal guide for physicians."

Op. cit., Preface, v. The glossary contained in Appendix B of the same work, at 330, defines psychasthenia as:

"a psychoneurosis characterized by obsessions, compulsions, and/or phobias."

Ironically, although the trial court was unimpressed with the defense contention Dwyer had a mental disease or defect, it imposed a probationary sentence with the condition that Dwyer "seek and accept" psychiatric treatment.

The exclusion of Doctor O'Connell as a witness deprived defendant of an opportunity to present the single most persuasive piece of evidence that was available to Dwyer on the major contested issue that the jury had to resolve to determine guilt or innocence. The record clearly shows that Doctor O'Connell was competent and his testimony relevant. To have excluded him as a witness deprived Dwyer of a fair trial and of his constitutional right to trial by jury.

This is particularly so when it is borne in mind that the defendant had no burden of proof on this issue, and was entitled to every opportunity to raise a reasonable doubt, especially in the light of the partisan, confusing and questionable testimony of Doctor Portnow.

This is the way he chose to express his professional opinion whether Dwyer suffered from a mental disease or defect at the time of the events charged in the indictment:

"It was my conclusion that he by no stretch of the imagination had a mental disease or defect at all \* \* \*." D 162a-23.

The summation of his conclusion Dwyer suffered no mental disease was:

"I mean, a gun never is a banana; he never loses its connection with reality. And, therefore, I cannot say that he has a mental disease." D 167a -12.

The portion of his response to an inquiry about his definition of "the legal definition" of "mental disease," D 182a-9.

shows Doctor Portnow's unfamiliarity with the evolution of the law:

"So that when used in the Freeman or whatever rule we're using, we are talking about primarily a psychiatric disorder." D 182a-22. (Emphasis added.)

His understanding of the concept of inability to conform conduct seems novel. He reiterated several times that if the defendant would not have committed the proscribed conduct with a cop watching him, he is ipso facto legally accountable for committing the conduct without the cop watching him. D 185a to D 188a.

Doctor Portnow was saying: "If you will defy cops, you're crazy." We can agree with that. But he was also asserting the converse: "If you won't defy cops, you're not crazy." And it was by the application of this converse test that he found Dwyer sane.

"He had very substantial capacity to know and appreciate that one did not sell guns, let's say, to informers or to government agents, in this particular case." D 171a-3.

The defense intended to show through Doctor O'Connell that a person able to control his conduct in the presence of a police officer may yet be unable to control it outside such presence, and is therefore not criminally responsible. Deprivation of this testimony was devastating to the defense.

## POINT II

Co-Defendants' Dramatization To The Jury In His Summation Of The Failure Of Dwyer To Take The Stand Deprived Him Of A Fair Trial.

The major evidence that Dobranski participated with full knowledge in the illicit transactions in guns was a series of letters (stipulated to have been written by Dwyer) to Smith after the transactions saying that "B. S. J." was Dwyer's partner, coupled with Smith's testimony that Dwyer had told him prior to the meetings in which the gun transactions occurred that he would be driven to the scene by "B. S. J." Naturally, in summation, Dobranski tried to persuade the jury that they should not accept this evidence as proof of the identity of Dobranski as "B. S. J.," or that he was Dwyer's partner. He argued how unfair it was to expect the jury to draw an inference against Dobranski from the letters of Dwyer when it was impossible to cross-examine the author of the letters because of his failure to take the witness stand. This was brought home by feigning a cross-examination of the letters themselves, placing them on the witness stand and addressing a series of questions to them (during summation) which, of course, went without answer.

It is a denial of a fair trial for either the court (unbidden) or the prosecution to invite the jury to draw an adverse inference from a defendant's failure to take the stand. Griffin v. California, U. S., 14 L. Ed. 2d 106. Some cases have held that it is improper for the court, unbidden by the defendant,

to comment, even in a cautionary way, on the defendant's failure to take the stand. Annot., 18 A.L.R. 3d 1335.

In all such cases, the vice to be avoided is the unfairness of the inference of guilt that the jurors may draw from defendant's exercise of a privilege that the constitution intended he have a right to enjoy without incurring any cost. When these principles are offended, new trials are granted, not to punish or discipline the government, the prosecuting attorney, or the trial judge, but to assure the defendant the unencumbered exercise of the privilege.

The same considerations apply where the adverse comments on a defendant's failure to take the stand are made by counsel for a co-defendant. Only one case has been found dealing with the specific issue of adverse comments by co-defendant's counsel. DeLuna v. United States, 308 F. 2d 140, re-hearing denied, 324 F. 2d 375 (5th Cir.) It holds that this entitles defendant to a new trial.

Both on principle and authority, comment by counsel for a co-defendant on a defendant's failure to take the stand denies the defendant a fair trial. The comment was particularly hurtful here, since it was practically the last word said by anybody on the defense side to the jury, coming in the summation of the latter of the two defendants. The jury was further reminded of this matter by the reply summation of the government which came back to the mock cross-examination of the letters and invited the jury to take the letters into the jury room and read them and make their own evaluation of them. (No objection is made to the

fact that the jury took the letters into the jury room. However, the reference to the letters by the government at this late stage of the case had the effect of reminding the jurors of the failure of Dwyer to take the stand. It is this reminder that is objected to.)

The basic reason for Dwyer not taking the stand might be obvious to lawyers and judges, but a jury might draw a very different inference. As was evident from the pattern of the relationships between the government and the government's witnesses (other than investigators regularly employed by the government), the standard operating procedure is for the government to get something on a gun collector, threaten him with criminal sanctions until he discloses information about the next link in the chain, and so forth, ad infinitum. The successful interposition of an affirmative defense, such as incompetence by reason of mental condition, would break the chain. This would have put strong motivation on the government to pick up the loose ends any way possible.

One obvious way would be to cross-examine Dwyer rigorously on his entire career collecting military paraphernalia. Since the facts of the defense case in chief showed that this was a gradually building obsession since defendant's earliest childhood, all gun transactions throughout his lifetime would have been within the scope of the direct examination, and the government would have had the right to inquire about them, even though the government's motivation might have been to seek evidence of an illegal transaction conducted during a period of remission during which it

might be able to prove defendant was competent. This would be a particularly tempting prospect for the government with respect to very recent activities of defendant. If there were recent transactions that defendant was thus forced to confess on cross-examination, he would have faced a dilemma of institutionalization (in a penal institution, if he were competent; in a hospital, if he were not).

But a jury could not be expected to appreciate these considerations, however familiar they are to lawyers and judges. Any attempt to explain them, whether by way of evidence or argument, would undoubtedly have been ruled out as too remote from the issues properly before the jury.

Left to its own devices, after having been forcefully reminded of defendant Dwyer's failure to take the stand, the jury very likely drew an inference that Dwyer stayed off the stand because an appearance would have tended to indicate that he was mentally competent at the time of the events charged in the indictment.

Protection of a defendant from the kind of dilemma Dwyer was placed in here is at the heart of the purpose of insulating defendant from adverse comment on the exercise of the privilege against self-incrimination.

Dwyer's privilege was abridged without warning to him, and under circumstances which made effective alleviation impossible. For this reason, Dwyer is entitled to a new trial.

As indicated by requests to charge, the government was aware, prior to trial, that either or both of the defendants might not take the stand.

Only the government knew in advance that the letters were still in existence and available as evidence. Although it was stipulated that Dwyer had written them, the general tenor of the record related to their presentation indicates they came as a surprise. They were produced during the testimony of a co-defendant whose trial had been severed, after a plea of guilty, Smith. The Jencks Act discovery furnished by the government included a written statement from Smith, which indicated generally that he was being cooperative with the government, but made no reference to the letters and gave no clue that he had preserved them. Smith's testimony, corroborated by other government evidence, was to the effect that his recollection of the letters was an afterthought that came to him a couple of days before he was supposed to testify.

The government recognized in its summation how damaging these letters were to Dobranski's position. If it must have appreciated this potential of the letters immediately upon their discovery, it should have recognized that Dobranski would have been motivated to attack them, and, since Dwyer stipulated their genuineness, the only way Dwyer could attack them was to point out that the inability of Dobranski to cross-examine the author on the significance of the initials "B. S. J." and his description as the author's "partner" left the letters as a shaky reed on which to premise Dobranski's guilt.

When the government introduced the letters in evidence, it set in motion a chain that would inevitably lead to Dobranski calling attention to Dwyer's failure to take the stand. The government knew this, and did nothing to protect Dwyer's exposure.

If the discovery of the letters came as a surprise, however pleasant, to the government, it certainly was a shock to the defense, coming as it did with the trial in progress, and the defense should not be precluded from raising this point because of a failure to move for severance on this ground prior to trial.

The trial court had shown a general hostility toward defense motions for severance, volunteering that it would consider all possible motions for severance to have been made on all possible grounds, and all were denied. (This was on December 9, 1975 and was not transcribed).

The government was aware that Dwyer might not take the stand. Only the government was aware of the compromise of Dwyer's privilege against self-incrimination that would be generated by the government's introduction of the letters. The government alone was aware of the letters prior to trial. The onus for moving for severance and persuading the court to grant it was on the government. Its failure to seek a severance entitles Dwyer to a new trial.

### POINT III

The Indictment Should Be Dismissed Because Of  
The Government's Collusion In An Independent  
Crime That Was A Substantial Factor In Obtain-  
ing Evidence.

Costabile, another collector indicted and convicted in a separate case, whom the government had squeezed for information against fellow collectors, D 32a-6 testified that between the first and second meetings at Smith's apartment, he dispatched through the United States mails from the State of New York or Connecticut to defendant Dobranski in the State of New Jersey a live cartridge. D 55a-17 Costabile orally undertook to do this at the first meeting in the presence of Dobranski and Dwyer. The purpose of doing so was to assure Dwyer and Dobranski that they were dealing with reliable people. D 57a-24 to D 58a-6 It was probably a major factor in inducing them to return for the second visit.

The two visits taken together were certainly more persuasive of a charge of conspiracy than the transactions at the first visit alone would have been. The presence of the conspiracy charge gave the government a basis for contending any statement by either co-defendant, Dwyer or Dobranski, was usable against the other. The ability to use the hearsay statements of Dobranski against Dwyer helped make out a case that the transactions were not the work of a crazy man. The government witnesses tried to portray Dwyer as being very casual about the transactions, yet very knowledgeable about the weapons, giving the meetings and the transactions more the aura of straight business dealings than the obsessive act of an incompetent person.

The sending of a live cartridge either through the mails or via the instrumentality of interstate commerce is criminal. 18 U.S.C., sec. 1716. The government is not allowed to commit a crime for the purpose of obtaining evidence. Since the goal sought here is not only a fair trial for the defendant, but the disciplining of law enforcement agents, the appropriate remedy is exclusion of the entire sequence of evidence resulting from the crime. Cf. Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217, and the celebrated decision of Judge Byrne in United States v. Ellsberg, dismissing an indictment based on illegally obtained evidence.

Here, the fact that the crime was committed by an informer, D 45a-10; D 50a-7 to 13 rather than a regular government employee, should make no difference. The informer, Costabile, admitted that he was receiving money from the government. He denied that it was for anything but expenses, D 52a-23 to D54a-12, but he testified that there had never been any records of the amounts or purpose of the payments, D 54a-4 to 10. He was engaged in a long series of investigatory-type activities against numerous suspects, including the co-defendants here. D 50a-7 to 13. When he made the undertaking in the presence of Dwyer and Dobranski to send the live cartridge to Dobranski, he was in the presence of at least one government agent, Kelly. Almost certainly the tactic of sending the cartridge to Dobranski had been approved in advance by Kelly or other representatives of the government. D 55a-22. Even if not, however, they had ample opportunity to intercept Costabile's execution of the undertaking. Even if they had no prior knowledge, and felt

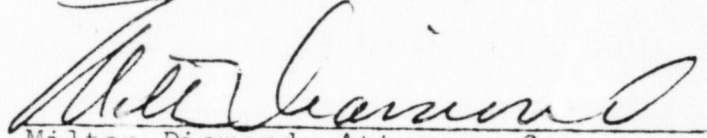
that it would have been awkward to completely back out of the commitment, they could have kept it without losing faith with the defendants by sending a cartridge that was not live, which would not have been criminal.

The government attempted no excuse for participation in this crime, despite the fact that Dwyer clearly put them on notice during the trial that he contended the use of the evidence resulting from the dispatch of the live cartridge entitled him to a mistrial. Under all the circumstances, Dwyer is entitled to have the indictment dismissed because of the criminal violation in mailing the cartridge to Dobranski.

CONCLUSION

For the reasons stated in Point III (obtaining evidence by a criminal act), the indictment should be dismissed. Alternatively, for the reasons stated in Point I (excluding defendant's treating psychiatrist) and Point II (co-defendant's reference to this defendant not taking the stand), defendant John J. Dwyer should be granted a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Milton Diamond", written over a horizontal line.

Milton Diamond, Attorney for  
Defendant-Appellant John J. Dwyer  
The Gate House, River Road  
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(201) 846-2500

Date: April 17, 1976

AFFIDAVIT OF SERVICE

Re: U.S.A. v. Dwyer  
Docket No. 76-1108

STATE OF NEW JERSEY :  
: ss.:  
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law,  
and being over the age of 21 upon my oath depose and say  
that: I am retained by the attorney for the above named  
Defendant-Appellant .

That on the 14th day of May, 1976, I served  
the within Brief for Appellant in the matter  
of United States of America v. John J. Dwyer,  
upon United States Attorney, Southern Dist., U.S.Courthouse,  
Foley Square, New York, N.Y. 10007  
by depositing two (2) true copies of the same securely  
enclosed in a post-paid wrapper, in an official depository  
maintained by the United States Government.

Muriel Mayer  
Muriel Mayer

Sworn to and subscribed  
before me this 14th day  
of May 1976.

Lorraine Leotta  
A Notary Public of the  
State of New Jersey.

LORRAINE LEOTTA  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires April 13, 1977